

U-999/CI-92-96 PROTECTIVE ORDER

BEFORE THE MINNESOTA PUBLIC UTILITIES COMMISSION

Don Storm  
Cynthia A. Kitlinski  
Dee Knaak  
Norma McKanna

Chair  
Commissioner  
Commissioner  
Commissioner

In the Matter of the Accounting  
and Ratemaking Effects of the  
Statement of Financial  
Accounting Standard 106

ISSUE DATE: March 13, 1992

DOCKET NO. U-999/CI-92-96

PROTECTIVE ORDER

**PROCEDURAL HISTORY**

**I. Proceedings to Date**

On March 13, 1992, the Commission issued an Order in this docket initiating an investigation into the ratemaking implications of a new accounting standard established by the Financial Accounting Standards Board. The new standard requires companies to account for post-employment benefits other than pensions on an accrual basis. Most companies, including most Minnesota utilities, have been recording these expenses on a cash basis.

The Commission determined that the investigation would require utilities to disclose confidential financial information for review and analysis by other parties and by the Commission. The Commission determined it was necessary to issue a Protective Order limiting access to confidential information to persons who have signed an agreement to follow procedures designed to protect its confidentiality.

**II. Protective Order**

The parties shall, under the terms of this Order and the Protective Agreement, furnish certain documents, data, information, studies, materials or other matters claimed by them to be of a confidential nature, which may or will be used in the conduct of the above-captioned matter by the party seeking the requested information.

Accordingly, IT IS ORDERED:

## **Proprietary Status Established**

1. All documents, data, information, studies, materials or other matters furnished pursuant to any discovery procedures or to any cross-examination that are proprietary information or trade secrets (Confidential Information) shall be furnished pursuant to the terms of this Order, and shall be treated by all persons afforded access thereto as constituting proprietary or trade secret information, and shall neither be used nor disclosed by any party other than the Department of Public Service or the Public Utilities Commission except for the purposes of this proceeding and solely in accordance with this Order or any further orders amending this Order. The Department of Public Service and the Public Utilities Commission may use Confidential Information obtained in this proceeding to discharge any regulatory duty imposed on them by law, provided that the disclosure of any such Confidential Information shall be governed by this Order and, when not inconsistent with this Order, the "Amended Notice of Internal Procedures for Handling Trade Secret Information," attached hereto as Exhibit B.

## **Persons Allowed Access**

2. Except as provided in Paragraph 1 hereof as respects the Department of Public Service and the Public Utilities Commission, Confidential Information shall not be used or disclosed except for purposes of this proceeding. Except as otherwise hereinafter provided with respect to bona fide employees of the Department of Public Service and the Public Utilities Commission, only those persons hereinafter described who have been identified and have executed the attached form of Protective Agreement may have access to any Confidential Information. Access to any specific Confidential Information is authorized to be made to the party and his or her "Outside, Expert Witness," if the party is a natural person unrepresented by counsel. If the party is not a natural person unrepresented by counsel, disclosure of such information is authorized to those persons indicated by the party as being its attorney or its "Outside, Expert Witness" and, as regards a governmental party, its professional staff members assigned to the above-captioned proceedings and designated to review such Confidential Information by the government party. Except as provided in Paragraph 1 hereof as respects the Department of Public Service and the Public Utilities Commission, access to Confidential Information is authorized solely for the purposes of presenting evidence, cross-examination, or argument in this proceeding. Persons authorized to review Confidential Information under this Order shall be individually to the party producing the Confidential Information prior to its disclosure.

**3. A.** Except as may result from subparagraph C hereof, no Confidential Information shall be disclosed to any person, other than an attorney, who is a regular employee, an officer, a director, a manager, an agent, or a shareholder of any party who is not a natural person. This extends to employees, officers, agents, directors, managers, shareholders, members, or partners of any company, corporation (profit or nonprofit), association (incorporated or unincorporated), partnership, firm or organization, with the exception of the Minnesota Public Utilities Commission (MPUC) and the Minnesota Department of Public Service (DPS). MPUC and DPS will comply with Paragraph 4 of this Order.

**B.** Upon full compliance with this Order, including execution of Protective Agreements, Confidential Information shall be disclosed to "Outside, Expert Witnesses" hired by parties which are not natural persons to analyze data, testimony, or records, or to present testimony in connection with this proceeding.

**C.** A party requesting data and a party responding to that request may agree, as between those two parties only on exceptions to the prohibition on disclosure of Confidential Information to a person who is not a party's attorney and who is not a party's "Outside, Expert Witness." Any such exceptions shall be in writing, executed by the two parties' attorneys, and filed with the Commission. These exceptions shall state the names and the addresses of any persons who are not the parties' attorneys and who are not the parties' Outside Expert Witnesses, but who may examine Confidential Information. All such persons covered by these mutually agreed upon exceptions shall be subject to all the terms, conditions and restrictions of this Protective Order, and shall execute copies of the Protective Agreement. If the two parties are unable to agree on an exception to the prohibition contained in Paragraph 2 hereof, the requesting party may move the Commission for an order granting an exception as between the two parties only and as to specific information. Any person authorized to review confidential data as a result of an order of the Commission shall be subject to all the terms, conditions and restrictions of this Protective Order, and shall execute copies of the Protective Agreement.

#### **Commission and Department Procedures**

**4.** The Public Utilities Commission and the Department of Public Service have established procedures to protect confidential data not obtained through contested case discovery pursuant to Minn. Stat. § 13.03, subd. 2 (1986), the Government Data Practices Act. Bona fide employees of those agencies need not execute the Protective Agreement form but shall comply with the "Amended Notice of Internal Procedures for Handling Trade

Secret Information" attached as Exhibit B hereto insofar as the same is not inconsistent with this Order. If any provision of this Order is in conflict with such Amended Internal Procedures, bona fide employees of the Department of Public Service and the Public Utilities Commission shall comply with this Order, rather than the Amended Internal Procedures.

No employee of the Public Utilities Commission, or the Department of Public Service, shall disclose any confidential data to any independent consultant who is not a bona fide employee of either agency until such consultant has first executed a Protective Agreement form and caused such form to be served upon the party providing the confidential data. Prior to the termination of the consultant's contract, the consultant shall return all copies of Confidential Information to the agency employing the consultant.

The provisions of Paragraph 3 of the Amended Internal Procedures, regarding the responsibility of state agencies for consultants' violations of the non-disclosure agreement, shall not be construed under this Order to limit the legal rights of any party providing Confidential Information.

#### **Signature Requirement**

5. Prior to making Confidential Information available as contemplated in this Order, the party furnishing the Confidential Information shall deliver a copy of this Order to the person seeking review of such information and, prior to disclosure, each authorized representative of the person seeking review of such information shall execute a written Protective Agreement in the form attached to this Order as Exhibit A, by which he or she shall agree to fully comply with and be bound by the terms of this Order. The person seeking review shall, at or prior to the time it receives Confidential Information, deliver to the party furnishing said Confidential Information a copy of such Protective Agreement(s). The Agreement(s) shall show each signatory's full name, permanent address, and employer. Paragraph 4 of this Order instead of this Paragraph 5 applies to the Department of Public Service and the Public Utilities Commission.

#### **Treatment of Confidential Data by Disclosees**

6. Confidential Information shall be made available in accordance with this Order. Each person requesting disclosure of the Confidential Information shall be furnished with one (1) numbered copy of the Confidential Information. Under no circumstances may any person authorized to inspect Confidential Information furnished hereunder copy or duplicate in any way such

Confidential Information, except that the Department of Public Service and the Public Utilities Commission may each make one copy in accordance with Paragraph 6 of Appendix B hereto. Further, such Confidential Information shall not be entered into, incorporated into, or stored in any computer or any electronic or magnetic data base or record of either the requesting person or any of its authorized "Outside Expert Witnesses," unless the information can be assessed only by a protective code known only to individuals authorized by this Order to inspect the information.

#### **References to Confidential Data in Public Contexts**

7. To the extent that reference is made to any Confidential Information by counsel or persons afforded access thereto during any aspect of this proceeding, including, but not limited to, motions, briefs, arguments, direct testimony, cross-examination, rebuttal, and proposed offerings of proof, any public reference to such Confidential Information should either be solely by title or its exhibit reference, or in such manner as to not unnecessarily disclose the Confidential Information. Confidential Information received by a party or person shall be given solely to the Commission, a Commissioner, and a specified member of the Commission staff and counsel pursuant hereto, and, if given in oral testimony, cross-examination, or argument, it shall be given only on such prior notice as is feasible to the affected party and, in any event, on sufficient notice to clear the hearing room of persons not bound by this Order. Public references means a reference that will not be placed in a sealed portion of the record. That part of the record of this proceeding containing Confidential Information, including all exhibits, writings, direct testimony, cross-examination, argument responses to discovery procedures, and the like, shall be sealed for all purposes other than as may be further ordered by the Commission.

#### **Uses of Confidential Data Limited**

8. Except as provided in Paragraph 1 hereof, all persons who are afforded access to any Confidential Information by reason of this Order shall neither use nor disclose the Confidential Information for any business, commercial, or competitive purposes or for any purpose other than the purpose of preparation for and conduct of this proceeding, and then solely as contemplated by this Order, and shall keep the Confidential Information secure in accordance with the purpose and intent of this Order.

## **Challenges to Production Requests or Confidential Classification**

9. A request for disclosure which, except for the claimed confidential nature of the matter sought, is proper shall be complied with unless the party from whom disclosure is sought asserts that the subject of the request involves Confidential Information. The parties hereto affected by the terms of this Order retain the right to question and to challenge any claim of a party furnishing documents, data, information, studies, materials, and other matters, that such matters contain proprietary information or trade secrets. If the parties are unable to resolve their differences as to whether the subject of the disclosure request involves Confidential Information, the party of whom disclosure is sought shall either comply with the disclosure request or, by Motion, request that the Commission make a determination as to whether the data, information, studies, or other matters constitute Confidential Information, governed by this Order. A governmental party who has voluntarily treated the subject matter of a disclosure as Confidential Information may, at any time during the pendency of the proceeding, request by Motion that the Commission make a determination as to whether the subject matter of the disclosure constitutes Confidential Information governed by this Order. During the pendency of such Motion and until otherwise ordered by the Commission, such governmental party shall continue to treat the subject of the disclosure as Confidential Information. The burden of proving that the subject of a disclosure request constitutes Confidential Information shall be upon the party making such claim. Any party aggrieved by an order of the Commission regarding disclosure or the treatment of the subject matter of the disclosure as Confidential Information may seek appropriate relief against any such Order.

10. The parties to this proceeding retain the right to question, to challenge, and to object on any lawful grounds to production, nonproduction, admissibility or inadmissibility of any and all documents, data, information, studies, materials, or other matters requested or furnished under the terms of this Order in response to discovery procedures or cross-examination. If the parties are unable to resolve their differences in this respect, the appropriate party may, by motion, request of the Commission a determination as to whether the documents, data, information, studies, materials, or other matters are inadmissible, subject to protection, or discoverable.

## **Return of Confidential Materials**

11. Except as hereinafter provided, upon completion of this proceeding, including any administrative or judicial review, each

numbered copy of Confidential Information made available under terms of this Order shall be returned to the disclosing party. The files of the Public Utilities Commission and the Department of Public Service containing Confidential Information shall be treated as required by Minn. Stat. § 13.01 et seq. and 138.161 et seq. (1986).

12. Except as provided in Paragraph 11 hereof, upon completion of this proceeding, including any administrative or judicial review, each party shall confirm and certify, by letter from the party or the party's attorney to the other parties or their attorneys, that all copies of Confidential Information have been returned to the parties furnishing Confidential Information and all notes, records (hard-copy, magnetic, electronic, or otherwise), calculations, data, documents, or analyses (handwritten, computer-based, or otherwise) relating to or containing any Confidential Information have either been destroyed or have been returned to the parties furnishing Confidential Information. The Department of Public Service and the Public Utilities Commission may make such other use of the Confidential Information obtained in this proceeding as is provided in Paragraph 1 hereof.

#### **Marking Confidential Data**

13. Each party shall adequately identify its Confidential Information (i) by providing a descriptive letter and (ii) by stamping each page or record with an appropriate notice. Each party shall segregate its Confidential Information from its other, filed testimony and exhibits in this proceeding.

#### **Other Applicable Statutes and Regulations**

14. Confidential Information supplied to the State of Minnesota is subject to the provisions of this Order, including Exhibit B hereto insofar as the same is not inconsistent with this Order, and to the Minnesota Government Data Practices Act, Minn. Stat. § 13.01, et seq. (1986). Information supplied to the United States is subject to the provisions of this Order and to the Federal Records Act, 44 USC, Chapters 29, 31 and 33, and to the Freedom of Information Act, 5 USC § 552, and these statute's implementing regulations.

BY ORDER OF THE COMMISSION

Richard R. Lancaster  
Executive Secretary

( S E A L )

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**PROTECTIVE AGREEMENT**

I have been presented with a copy of the Protective Order dated  
\_\_\_\_\_ in the above-entitled case. I have  
read the Order and agree to be bound by its terms.

I have requested review of the Confidential Information on behalf  
of \_\_\_\_\_.

Dated this \_\_\_\_\_ day of \_\_\_\_\_, 1992.

\_\_\_\_\_  
Signature of Person Requesting Review of  
Confidential Information